IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

Arbitration Case No.140 of 2006

Date of Decision: 03 - 12 - 2007

Punjab State Industries Development Corp. Ltd. ....Petitioner

through Mr.Sanjeev Trikha , Advocate

v.

Sh.Vijay Kumar Garg ....Respondent

through Mr.Madan Mohan, Advocate

CORAM: HON'BLE MR.JUSTICE VIJENDER JAIN, CHIEF JUSTICE

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1. Whether Reporters of Local Newspapers may be allowed to see the judgment?

2. To be referred to the Reporters or not?

3. Whether the judgment should be reported in the Digest?

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VIJENDER JAIN, CHIEF JUSTICE (ORAL)

This petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter to be referred as, `the Act') has been received by transfer from the Court of Civil Judge (Sr. Division), Chandigarh for appointment of an Arbitrator, as the respondent has failed to supply the vacancy as per the arbitration clause.

The dispute redressal mechanism as well as arbitration clause between the parties are contained in Clauses 35 and 36 of the arbitration agreement which are to the following effect:-

“35. Subject to the provisions herein contained, this Agreement

shall continue to remain in force and operation so long as the share-holding of either of the parties hereto (including the nominee(s)) shall not fall below 10% of the paid-up equity capital of the COMPANY.

36. All differences and disputes between the parties hereto on any clause or matter herein contained or their respective rights, claims or liabilities hereunder or otherwise, howsoever, in relation to or arising out of this agreement, shall be referred to arbitration by two arbitrators (one to be appointed by each party) who shall, before proceeding with the reference, appoint an Umpire and such arbitration shall be governed by the Indian Arbitration Act, 1940 or any modification or re-enactment thereof for the time being in force."

It is the contention of the petitioner that pursuant to the said arbitration clause, the petitioner appointed one Arbitrator and then requested the respondent vide letter dated 22.12.1997 to appoint the Arbitrator on his behalf. In response to the said letter, the respondent took the following plea vide letter dated 22.1.1998:-

"This is with reference to your letter No.PSIDC: S&L: 9051 dated 22nd December, 1997, appointing an Arbitrator with regard to the above subject.

In this connection and further to the discussions I had with your Managing Director, I accept my liability with regard to the option exercised by me vide my letter dated 31st January, 1995 for purchase of 5,00,000 Equity Shares of Rs.10/0 each of the Corporation's share-holdings in M/s.Alpha Drugs India Ltd. Amounting to Rs.93,75,000/-. I also hereby admit that I will pay the above consideration amount with interest @ 18% P.A. from the date on which the amount was payable by me till the date of payment as per

agreement. The payment will be either effected by me or I shall arrange to have the consideration amount remitted by our new collaborators i.e. DMS Andeno, Holland. I earnestly request that for making the above said payment, I may be given time upto 30th September, 1998.

In view of the above commitment, I request you to withdraw the reference to the appointment of the Arbitrator."

In spite of the said letter, neither payment was made by the respondent nor any Arbitrator was appointed. The petitioner again wrote to the respondent for appointing an Arbitrator on 15.2.1999 to which the respondent replied on 4.3.1999 stating that in terms of Clause 35 of the agreement, there is no subsisting arbitration agreement between the parties.

Pursuant to the aforesaid reply, the petitioner filed a petition as stated above in the year 2001 before the Civil Judge (Sr.Division), Chandigarh invoking the arbitration clause and praying to the Court for appointing an Arbitrator. However, in the year 2006, the petition was transferred to this Court in view of the decision in **SBP and Co. v. Patel Engineering Ltd. and another**, (2005)8 SCC 618.

Learned counsel appearing for the respondent has contended that in view of Clause 35 of the arbitration agreement, which has been reproduced above, admittedly the share-holdings of the company had come to be less than 10% on 3.7.1997, therefore, the agreement was no more in existence and the respondent was within his rights not to appoint the Arbitrator. Another limb of the argument of learned counsel for the respondent is that the dispute and differences arose in 1997, whereas the petition invoking the arbitration clause was filed in the year 2001 which was highly belated in view of the provisions of Article 137 of the Limitation Act and, therefore, no Arbitrator could have been appointed. In support of his contention, learned counsel relied upon a judgment of the Supreme Court in

Punjab State & Ors. v. Dina Nath, AIR 2007 SC 2157.

I have given my careful consideration to the arguments advanced by learned counsel for the parties.

The plea of the respondent that in view of Clause 35 of the arbitration agreement, the share-holdings of the company had come below 10% and, therefore, the agreement does not subsists, on the face of it, is an after thought. The fact that the company's share-holdings, being less than 10%, according to learned counsel for the respondent, was on 31.7.1997 but from the contents of letter dated 22.1.1998 which has been reproduced above, it is manifestly clear that the respondent accepted his liability of making payment of Rs.93,75,000/- along with interest @ 18% P.A. and requested the petitioner for withdrawal of the reference for appointment of an Arbitrator.

Once the respondent having agreed to make the payment and requesting the petitioner for withdrawal of the reference for appointment of Arbitrator, then the plea that the arbitration agreement had ceased to be in existence could not have been taken subsequently in view of Clause 35 of the arbitration agreement. Therefore, the stand of the respondent is not bona fide.

Reverting to the submission made by learned counsel for the respondent that Article 137 of the Limitation Act applies to the present proceedings, there is no quarrel with the proposition in **Dina Nath's case (supra)**.

However, one cannot lose sight of the fact that Arbitration and Conciliation Act is a special Act and Section 43 of the said Act provides for limitation. Section 43(2) reads as follows:-

> "**43. Limitations:- xx xx xx xx xx xx xx**
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> **(2)** For the purpose of this section and the Limitation Act, 1963, an arbitration shall be deemed to have commenced on the date referred in Section 21."

Section 21 of the Act is as follows:-

"**21. Commencement of arbitral proceedings:-**

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

From the aforesaid provisions of law, the intention of the legislature is manifestly clear that the embargo for attracting the provisions of limitation is on the date when arbitral proceedings in a dispute is received by the respondent, on a request for that dispute to be referred to arbitration.

The legislature in its wisdom has not taken any other provision or contingency or other cause of action into consideration except when a request is made by a party to an agreement to refer any dispute which is received by the respondent, for the purpose of calculating the period of limitation.

The request for invocation of arbitration clause was made by the petitioner on 22.12.1997. When the request for invoking the arbitration agreement for constituting a Tribunal under the agreement was made by the petitioner to the respondent, that invocation was within the period of limitation as contemplated under Section 43 read with Section 21 of the Act. Therefore, the argument raised by learned counsel for the respondent that the petition filed by the petitioner under Section 11 of the Act suffers from delay, is not well founded.

Let it be examined from a different angle.

Arbitration clause is admitted in the agreement. A party invokes the said arbitration clause within period of limitation, as has been done in the present case. Another party having received the letter of invocation sits over the same and does not supply the vacancy either on the plea that the opposite party has not to supply the vacancy or by not appointing an Arbitrator and after a lapse of considerable time, party approaches the Court by filing a petition under Section 11 of the Act and the opposite party frustrates the attempt on the ground that the party

has not come for appointment of the Arbitrator within time. Therefore, what is important is the date of invocation of the arbitration clause which in this case is 22.12.1997 and the reply of the respondent which was given on 22.1.1998 where the only plea taken by the respondent was an assurance of making payment and on that basis requesting the petitioner to withdraw the reference for appointment of an Arbitrator. Therefore, there is no force on either account in the submissions made by learned counsel for the respondent.

The respondent has failed to refer the dispute to the Arbitrator which has arisen between the parties pursuant to the arbitration clause and, thus, is himself liable for not supplying the vacancy to the Arbitrator within the stipulated time. Therefore, I appoint Justice S.K.Jain (a retired Judge of this Court) as Arbitrator to adjudicate upon all the disputes between the parties.

The Arbitrator shall fix his own fee.

The intimation of appointment be sent to the Arbitrator.

Parties to appear before the Arbitrator on 22.12.2008 at 4.00 P.M.

Petition stands disposed of.

(VIJENDER JAIN)
CHIEF JUSTICE

December 3, 2007

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